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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1600

UNION CAMP CORPORATION,
Petitioner,

vs.

JAMES E. DYAL, JR., et al., JOHN M. MURRELL, et al., and LEON A. WILSON, II, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The history of the relationship among the parties, and the facts involved are extensively recited in the decision of the Court of Appeals for the Fifth Circuit (A. 1-21), and in the decision of the District Court (A. 23-57).

This is a diversity of citizenship action for a declaratory judgment and for the payment of inverse damages to redeem against a forfeiture of two 99 year timber land leases, containing options to purchase the lands exercisable in the future. The action was filed in the Southern District of Georgia by Union Camp Corporation, as lessee, against twelve defendants, as lessors. Union Camp caused a temporary restraining order to issue restraining the defendants from interfering with its possession of the lands; restraining the defendant, J. Edgar Dyal, from prosecuting an action then pending in the Southern District of Florida for breach of the leases, damages, and forfeiture; and restraining the defendants, parties to an action then pending in Appling County, Georgia, from prosecuting the action challenging the validity of the options to purchase the lands. The latter action was in the process of voluntary dismissal when the Union Camp suit was filed.

With the action in the posture noted, the Executive Vice President and the attorney for Union Camp met in Miami, Florida, with counsel for the defendant, Willie Eason Dyal, counsel for six other defendants, who held written authority to "take such steps as you deem necessary to protect our interests in this litigation", and with the defendant, J. Edgar Dyal, whose authority to represent the other defendants was oral. J. Edgar Dyal announced at the meeting that he was not authorized to discuss other lands under lease from the defendants to Union Camp (known as the Fargo Tract), which are not involved in this litigation, but that he was authorized to "speak" for the whole title of the lands involved, which are known as the Dyal #1, or Surrency Tract.

After extensive negotiations, the parties present and counsel agreed to a settlement amount for the damage claim of J. Edgar Dyal, and agreed that all defendants would convey their fee interests in the Surrency Tract to Union Camp for the price fixed in the option to purchase, plus an additional sum as premium for acceleration of purchase option. The agreement was reduced to writing and signed by counsel. The defendant, Willie Eason Dyal, also agreed to convey her fee interests in the Fargo Tract to Union Camp for an agreed sum, plus an additional sum for her attorneys' fee; and has since fully performed her agreements by conveying her interests in the Surrency and Fargo Tracts to Union Camp.

After the meeting, J. Edgar Dyal, became dissatisfied with the stipulation and notified his counsel he did not intend to carry it out. He and his counsel immediately thereafter notified Union Camp and its counsel of his intention. All other defendants have repudiated the stipulation of counsel and object to its enforcement.

Upon failure of the eleven defendants to perform in accordance with the stipulation, Union Camp moved to enforce the stipulation. After an extensive evidentiary inquiry, the District Court ordered that the stipulation be enforced against the eleven defendants (App. A. 23-57). On appeal by the eleven defendants, the Court of Appeals for the Fifth Circuit (App. A. 1-21) affirmed the order requiring enforcement of the stipulation against the defendant, J. Edgar Dyal, and reversed the order as being unenforceable against the remaining ten defendants.

Union Camp petitions for a writ of certiorari to review the decision of the Court of Appeals. The defendants, except Willie Eason Dyal, respond here in opposition.

REASONS FOR DENYING THE WRIT

I. Under Georgia law an agent without written authority of his principal may not contract for the conveyance of lands of the principal, even under the guise of compromise and settlement of litigation wherein the title to the lands are not in dispute, and the principal neither authorizes, approves, nor ratifies such action.

Union Camp asserts the holding (that an agent's compromise settlement of a pending action which provides for the conveyance of real property must be in writing unless ratified by the principal) is in conflict with the law of the State of Georgia. In support of its assertion, Union Camp contends that the Court of Appeals misinterpreted the decision of the Supreme Court of Georgia in the case of *Fulford v. Fulford*, 225 Ga. 9, 165 S.E.2d 848 (1969) on this point.

Union Camp's assertion is miscast, and its contention is in error.

The Court of Appeals characterized the stipulation, as follows:

> "The stipulation did not purport merely to settle the law suit. It neither confirmed the validity of the leases and the option, nor declared their invalidity. It was silent as to all other issues raised in this litigation except Dyal's request to share in the stumpage based on a compromise as to value. In no other way did it compose the issues by determining some of them in favor of one party and others in the favor of another. It did not provide for a cash payment to

dispose of some of the contentions made. Instead, as it recites, it settled *all issues* between the parties, not merely those in litigation.

> "When the conference was arranged, counsel for Union Camp promised that one of its officers who could speak authoritatively for the company would attend, but it agreed to participate only on condition that the persons representing the Dyal interests 'were prepared to speak for the whole title and deliver titles to the whole property of Surrency No. 1.' That was the purpose and the result of the conference."
>
> (App. A. 11)

The Court held that the stipulation provided for the transfer of title to real property situated in Georgia, and thus the District Court was obliged to follow the Georgia law in determining the validity and effect of the stipulation, as well as the power of agents to execute it.

The basic rule of law in Georgia was correctly noted, as follows:

> "A Georgia statute gives attorneys 'authority to bind their clients in any action or proceedings, by any agreement in relation to the cause, made in writing, . . .' Ga. Code 9-605. But the stipulation in this case was not an agreement 'in relation to the cause.' Nor was it a settlement that disposed of the issues in the proceeding. Cf. *Ingalls v. Ingalls*, N.D. Ala. 1959, 177 F.Supp. 151, Cir. 1960, 280 F.2d 423; *Cia Anon Venezolana De Navegacion v. Harris*, 5 Cir. 1967, 374 F.2d 33. It was a contract to sell lands.

"A contract for the 'sale of lands, or any interest in, or concerning them,' Ga. Code 20-401 §(4)4, 'must be in writing, signed by the party to be charged therewith, or some person by him lawfully authorized. . . .' *Id.* at 201-401. To implement this statute of frauds, Ga. Code 4-105 provides, 'the Act creating the agency shall be executed with the same formality . . . as the law prescribes for the execution of the act for which the agency shall be created.' This evidently requires that the agent's power to sell land must be in writing absent later ratification of his acts, *Baxley Hardware Co. v. Morris*, 1927, 165 Ga. 309, 140 S.E. 869, or estoppel of his principal to deny his authority. See *Wade v. Powell*, 1860, 31 Ga. 1; *Fulford v. Fulford*, 1969, 225 Ga. 9, 165 S.E.2d 848. . . ."

(App. A. 12, 13)

The Court reviewed the cases in Georgia following the rule that written authority to the agent must be shown to support his sale or lease of the principal's lands and that one dealing with such agent is charged with knowledge of the rule and is under a duty to inquire and ascertain whether such written authority exists. It then proceeded to consider whether the exception to the rule followed in *Fulford v. Fulford*, *supra* at page 4, applies in the instant case.

Fulford involved an action among members of the same family, which under Count 1 sought to set aside a conveyance of lands by one of the members to another. Count 2 was described as follows:

> "It was alleged in this court that on March 29, 1967, while the instant case was pending, all of the parties with their counsel met in the courtroom of the Wheeler County courthouse and made an agreement which was an accord and satisfaction (compromise settlement) of the action referred to in Count 1 . . ."
>
> (165 S.E.2d 848, 852)

Count 2 sought to enforce the oral agreement providing, among other things, for the reconveyance of the lands in issue. On this point the Court held:

> "'. . . The compromise of a contention as to the property rights, the final outcome of which, if settled by litigation, the parties consider to be doubtful, furnishes a consideration sufficient to support the compromise contract. It is well settled that in equity the termination of family controversies affords a consideration which is sufficient to support a contract made for such purpose.' Belt v. Lazenby, 126 Ga. 767, 56 S.E. 81. . . ."
>
> (165 S.E.2d 848, 853)

and

> "'Where an agreement for the compromise of a pending cause is made by a party and his counsel on the one hand, and by counsel of the opposite party and ratified by his client, whereby one of the parties is to do certain acts, such agreements upon performance or offer to perform according to its terms within a reasonable time, becomes

> binding on the parties, and puts an end to the original subject-matter of the controversy * * * Such an agreement need not be in writing. . . .'"
> (165 S.E.2d 848, 854)

citing, *inter alia*, *Boswell v. Gillen*, 131 Ga. 310, 62 S.E. 187 (1908).

The Court of Appeals, in its decision now under attack, distinguished *Fulford* from the instant case thus:

> ". . . The Court's opinion quoted with approval an earlier observation that the requirement of a written power of attorney be in writing has 'no application to an oral agreement and compromise of a pending suit. . . .' In *Fulford*, however, title to the property was at issue in the litigation, and all the parties expressly ratified their attorney's settlement. That, too, was the basis for enforcing the stipulation by counsel in a land dispute, *Dean v. Jackson*, 1964, 219 Ga. 552, 134 S.E.2d 601, where the court found that the client gave express assent to the action taken by his attorney."
> (App. A. 15)

The Court of Appeals noted that in the instant case the stipulation was not an agreement "in relation to the cause". "Nor was it a settlement that disposed of the issues in the proceedings. . . . It was a contract to sell lands." (App. A. 12). "There is no evidence that the Dyal family (the ten defendants) desired him (J. Edgar Dyal) to sell their interests in the land." (App. A. 16). "Here there can be no question of ratification or delay on the part of any of the Dyals after the stipulation was signed." (App.

A. 13). "The sale of Surrency was not incidental or reasonably necessary to settling the litigation. Indeed the reverse is true: the litigation was incidental to ownership of the fee. . . ." (App. A. 16).

The Court of Appeals correctly interpreted the decision in *Fulford*, and followed it by ordering the stipulation enforced against J. Edgar Dyal, who "expressly authorized his lawyers to execute the stipulation"; and "ratified it by acquiescing in it after it was signed." (App. A. 19). The Court of Appeals correctly interpreted the decision in holding the exception does not apply to the other defendants, and followed the basic rule, in ordering:

> "As to all the defendants, other than J. Edgar Dyal and Mrs. Willie Eason Dyal, the suit may continue. Determination of their rights will abide the outcome of the litigation."
>
> (App. A. 21)

The decision of the Court of Appeals fully accords with the law of Georgia.

II. The law of Georgia does not empower attorneys with written authority from their clients "to take such steps as you deem necessary to protect our interests in this litigation" to contract, in compromise and settlement of litigation or otherwise, for the conveyance of lands of the client, where the title to the lands are not in dispute, and the client does not authorize, approve or ratify the action.

In passing we question whether the rule in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) compels that, in diversity of citizenship cases

in Georgia, attorneys admitted to practice in the United States courts, who are also admitted to practice in the state courts of Georgia, come into federal courts cloaked with the plenary powers of attorneys of record in the courts of Georgia. See: *Sperry v. Florida*, 373 U.S. 379, 83 S.Ct. 1322, 10 L.Ed.2d 428 (1963) and *Cord v. Smith*, 338 F.2d 516 (9th Cir. 1964).

Even the plenary powers of attorneys of record in Georgia do not rise to the heights suggested by the petitioner. Union Camp asserts that Georgia law vests plenary power in attorneys of record to permit them to agree to convey lands of their clients, without the consent of their client, unless the opposing counsel is advised of an express limitation in the contract of employment restricting the attorney from so agreeing. The assertion is overbroad.

The plenary power of attorneys of record in Georgia under a general retainer contract is limited. These powers are limited to the scope of the action in which they are retained to represent their client. In *Wade v. Powell*, 31 Ga. 1 (1860), at page 22, it was said: "(a)n attorney may confess a judgment against his client, and this involves every thing." As the Court of Appeals noted: "(a) Georgia statute gives attorneys 'authority to bind their clients in any action or proceedings, by any agreement in relation to the cause, made in writing, . . .' Ga. Code 9-605." (App. A. 12).

Had the defendants' attorneys confessed judgment in this declaratory judgment action by Union Camp, as lessee, against the defendant, as lessors, the title to the lands would not be adversely affected, but would be reaffirmed in the defendants. The Court of Appeals held, as follows:

"The stipulation did not purport merely to settle the law suit. It neither confirmed the validity of the leases and the option, nor declared their invalidity. . . . Instead, as it recites, it settled *all issues* between the parties, not merely those in litigation."

(App. A. 11)

". . . But the stipulation in this case was not an agreement 'in relation to the cause.' Nor was it a settlement that disposed of the issues in the proceedings. (Citations omitted.) It was a contract to sell lands."

(App. A. 12)

and noted:

"The lawyers representing the Dyals never purported to act on their own authority as lawyers, express or implied. They made it clear in the presence of Union Camp's representatives that they were seeking authorization from J. Edgar Dyal, and would sign only if he instructed them.

". . . But Dyal's authority was more tenuous than the lawyers'; they at least had a written letter of employment. His authority was purely oral." (App. A. 15)

The case at bar falls squarely within the limitations noted by the Court in *Davis v. First National Bank of Blakely*, 139 Ga. 702, 78 S.E. 190 (1913), related by petitioner in brief at page 15, wherein the Court held that the statute:

> ". . . does not mean that when a client employs an attorney to bring or defend a suit, it ceases to be the client's litigation, that he has no power to say whether he will litigate or compromise his suit, and that the attorney becomes the owner or absolute master of the litigation, so as to be able to sell or give away his client's property rights by contract, in spite of his client."
>
> (139 Ga. 702, 710, 78 S.E. 190, 194)

III. The rule that courts should favor compromise does not require enforcement of unauthorized and unwanted commitments by others to sell real property owned by the clients.

Compromises of disputed claims are favored by the courts where the parties acting in good faith settle a controversy.

Courts favor compromise, but not at the expense of forcing an unwanted sale of their real property, the title to which is not in controversy, upon unwilling parties to litigation who neither participated in the negotiations nor authorized, approved nor ratified the stipulation.

In the decision *sub judice*, the Court of Appeals has ordered the stipulation enforceable against J. Edgar Dyal, the only party defendant who authorized it; and has ordered the stipulation unenforceable against the ten defendants who neither participated in the negotiations, nor authorized, approved nor ratified the stipulation.

IV. The "clearly erroneous" rule does not require a reviewing court to accept the conclusions reached by the trial court from the facts as found.

Petitioner contends that the failure of the Court of Appeals to follow findings of fact held not to be clearly erroneous is in disregard of Rule 52, Fed.R.Civ.P. and warrants this Court's review under its power of supervision. Petitioner is in error. The Court of Appeals accepted the facts but disagreed with the conclusion reached therefrom by the trial court, stating:

> "The trial court concluded also that Dyal was in fact 'the agent of all the defendants in this case' except Mrs. Willie Eason Dyal, and 'possessed authority to act for them in all matters pertaining to the litigation including the settlement thereof.' But Dyal's agency was more tenuous than the lawyers'; they at least had a written letter of employment. His authority was purely oral.
>
> "While the evidence with respect to Dyal's actual authority is contradictory, we are not left with the firm conviction that the trial court's finding was clearly erroneous. (Citations omitted.) But the conclusion reached from this fact does not follow: because J. Edgar Dyal had authority to settle the law suit does not mean that he had power to agree to convey a fee interest in the real property. . . . There is no evidence that the Dyal family desired him to sell their interests in the lands. . . .

"The sale of Surrency was not incidental or reasonably necessary to settling the litigation. Indeed the reverse is true: the litigation was incidental to ownership of the fee. Nor does authority to sell a fee in real property usually accompany authority to negotiate for settlement of the type of claim the Dyals were presenting. Authority to act in the principal's business does not usually imply authority to sell the principal's interest in lands. Restatement of Agency 2d §52(b). Dyal's acts suffer from the same defects as his counsels': he acted beyond his authority, and he agreed to convey lands without written authority from his principals. Indeed it does not appear that he had even oral authority to do so."

(App. A. 15, 16)

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Dated at Miami, Florida, this 30th day of June, 1972.

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CERTIFICATE OF SERVICE

I, THOMAS G. SPICER, one of the attorneys for JAMES E. DYAL, JR. and CHARLES SMITH DYAL, each individually and both as surviving Substitute Co-Trustees under a Trust Deed dated December 15, 1941, JAMES E. DYAL, MRS. IRENE VAUGHAN DYAL, MRS. ELIZABETH DYAL SAMMONS, MRS. DOROTHY DYAL BRISCOE, ERNEST EUGENE DYAL, FORREST LEE DYAL III, MRS. BARBARA DYAL ROBINSON, MRS. KAY DYAL MILLER, and MRS. HILJA STRANDEN LAHDE, Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 30th day of June, 1972, I served three copies of the foregoing BRIEF IN OPPOSITION on each other party separately represented in the proceeding, by mail in a duly addressed envelope, with air mail postage prepaid, to counsel of record as follows: To: George W. Williams, Attorney for Union Camp Corporation, Bouhan, Williams & Levy, 47 Bull Street, Savannah, Georgia 31402. To: Anthony A. Alaimo, Attorney for Mrs. Willie Eason Dyal, individually and as Administratrix of the Estate of Milton Dyal, deceased, Alaimo & Taylor, 1803 Norwich Street, Brunswick, Georgia 31521. To: Malberry Smith, Jr., Attorney for John M. Murrel and Julian F. Corish, Corish, Smith & Remler, P.O. Box 8123, Savannah, Georgia 31402. To: Leon A. Wilson II, *pro se.*, Albany Avenue, Waycross, Georgia. To: C. Edwin Rosier, *pro se.*, P.O. Drawer 1327, Waycross, Georgia.

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